

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the SIRS Appeal of
Kofoworola Adeyeye

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Manuel J. Cervantes (ALJ) for hearing on June 28, 2010, commencing at 9:30 a.m. at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota, pursuant to a Notice of and Order for Hearing, filed by the Department of Human Services (Department or DHS) on January 14, 2010. The record closed on July 16, 2010, upon receipt of the parties' written closing argument.

Corrie A. Oberg, Assistant Attorney General, appeared for the DHS. David D. Himlie, Esq., appeared for Kofoworola Adeyeye (Respondent).

STATEMENT OF ISSUES

1. Did Respondent submit claims for Medicaid reimbursement for services she did not provide in violation of Minn. Stat. § 256B.064, subd. 1a, and Minn. R. 9505.2165, subp. 4?

2. Did the Department properly suspend Respondent from participation in Minnesota Health Care Programs (MHCP) based on a pattern of obtaining Medicare reimbursement for services she did not provide, pursuant to Minn. Stat. §§ 256B.064, subd. 1a and Minn. Rs. 9505.2165?

The ALJ concludes that Respondent did submit some improper claims for reimbursement in violation of Minnesota law, but not all of the improper claims as alleged by the Department, and therefore, suspension from participating in MHCP for two years appears disproportionate to the violations. The ALJ recommends that the Department impose a sanction less severe than suspension, for example, monetary recovery under Minn. R. 9505.2215 and the imposition of the costs of the investigation under Minn. R. 9505.2200, subp. 5.

Based on the evidence in the hearing record, the ALJ makes the following:

FINDINGS OF FACT

1. In 2001, Respondent was licensed as a nursing assistant in the State of Maine. Respondent moved to Minnesota and has been a personal care assistant (PCA) since 2006 and works for America's Choice Nursing Services (America's Choice). Prior to this proceeding, Respondent has had no disciplinary actions relative to her health care profession.¹

2. As a PCA, Respondent earned an hourly rate of \$10.75 with America's Choice. America's Choice received a Medicaid reimbursement rate of \$15.92 at \$3.98 per 15 minute increments for PCA services provided by Respondent.²

3. During a post-payment Surveillance and Integrity Review Section (SIRS) investigation of America's Choice, Respondent came to the attention of the SIRS investigator.³

¹ Respondent's Written Closing Argument (Resp. Clsg.)

² *Id.*

³ Legal Background: In Minnesota, the Medicaid program is jointly funded with the federal government and administered by DHS. Title XIX of the Social Security Act, 42 U.S.C. § 1396 (2007); Minn. Stat.ch.256B (2008). The purpose of Medicaid is to provide necessary medical assistance to certain individuals whose income and resources are insufficient to meet the cost of the medical care they need. 42 U.S.C. § 1396 (2006); *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 1758 (2006). Because of this funding arrangement, Minnesota must comply with federal statutes and regulations of the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid, including the implementation of a surveillance and utilization control program to safeguard against "unnecessary or inappropriate use of Medicaid services and against excess payments." 42 C.F.R. § 456.3(a) (2009). Under federal law, the states must conduct post-payment reviews on a random basis to discover and correct inappropriate use of Medicaid payments. 42 C.F.R. § 456.23 (2009).

In response to its federal obligation, DHS created the Surveillance and Integrity Review Section (SIRS) and promulgated Minn. Rs. 9505.2160 to 9505.2245 (2008) to address the inappropriate use of Medicaid payments. SIRS is charged with investigating providers for compliance with federal and state statutes, rules, and regulations. Minn. R. 9505.2160, subp. 1 (2008). SIRS conducts post-payment review of claims submitted for Minnesota Medical Assistance (MA) payments. SIRS may select provider claims for review at random or based on a suspicion of fraud or improper payment and may examine the providers' health service or financial records with 24-hour notice. MA is the predominant program of the MHCP Department-administered health care programs. Under Minnesota law, DHS may impose sanctions on a provider and/or may recover inappropriate payments when it discovers that a provider has inappropriately billed Minnesota MA. 42 C.F.R. § 456.725 (2009); Minn. Stat. § 256B.04, subd. 4 and 15(a) (2008). Upon completion of an investigation, SIRS has discretion to pursue criminal, civil, or administrative action. Minn. R. 9505.2200, subps. 4 and 5 (2008). DHS commences its action to collect inappropriate payments or impose sanctions by issuing a Notice of Agency Action to the provider. Minn. R. 9505.2230, subp. 1 (2008). A provider who disputes the proposed agency action may request an appeal. Minn. Stat. § 256B.04, subd. 15(c) (2008); Minn. R. 9505.2245, subp. 1 (2008).

4. The investigation revealed that Respondent claimed that she provided in-home PCA services to M.D., a school age child, during times when the child was in school.⁴

5. On November 18, 2008, the investigator obtained M.D.'s school attendance records from the school for the period of April 1, 2008 through September 30, 2009.⁵

6. Respondent's husband, Tunji Adeyeye (Tunji), also provided PCA services to M.D. through the relevant school year period in question. The investigator also reviewed Tunji's timesheets and found five overlaps between the timesheets where both PCAs claimed that each provided PCA services to M.D. for the same time period.⁶ Only one PCA provider was to provide PCA services during a given time frame.

7. On March 10, 2009, a Notice of Agency Action was issued by the DHS, suspending Respondent from participation in MHCP for a period of two years.⁷

8. On March 18, 2009, the investigator spoke with Barb Gisslen, School District Representative, who clarified that M.D. only attended school half days from 8:30 to 11:10 a.m. during the 2007-08 school year, rather than full-time as previously expressed.⁸

9. The additional school attendance information did not change DHS's decision to suspend the Respondent.⁹

10. On April 6, 2009, Respondent appealed the Agency Action.

11. M.D. was in school half-time on May 2 and on June 2, 3, 4, and 5, 2008.¹⁰

12. Tunji Adeyeye erroneously claimed PCA hours of work that overlapped with Respondent on May 6, July 19, and 25, August 21, and September 8, 2008, totaling 22 hours.¹¹ His hearing testimony on this point was un rebutted.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 256B.04, subds. 15(c), and 256B.064, subd. 2.

⁴ Testimony (Test.) of J. Twaddle.

⁵ *Id.*; Exs. 3 and 2.

⁶ *Id.*

⁷ *Id.*; Ex. 4.

⁸ *Id.*; Ex. 5.

⁹ *Id.*; Ex. 7.

¹⁰ Ex. 2.

¹¹ Test. of Tunji Adeyeye (Tunji).

2. The Department has complied with all relevant procedural requirements of statute and rule.

3. The Department bears the burden of proof to show, by a preponderance of the evidence,¹² the Respondent violated Minn. Stat. 256B.064 and Minn. R. 9505.2165, subp. 2 (A) (1).¹³

4. Minn. Stat. § 256B.064, subd. 1a., in relevant part, states,

[t]he commissioner of [DHS] may impose sanctions against a vendor of medical care for any of the following: fraud, theft, or *abuse* in connection with the provision of medical care to recipients of public assistance; ...and a pattern of making false statements of material facts for the purpose of obtaining greater compensation than that to which the vendor is legally entitled.... (Emphasis added.)

5. In Minn. R. 9505. 2165, the definition of “abuse” includes submitting repeated claims, or causing claims to be submitted, from which required information is missing or incorrect.

6. The Department has established by a preponderance of the evidence that Respondent did not provide PCA services to M.D. on May 2 and on June 2, 3, and 5, 2008 as claimed by Respondent.¹⁴ This is “abuse” under Minn. Stat. § 256B.064, subd. 1a, and as defined in Minn. R. 9505.2165.

7. The Department did not establish by a preponderance of the evidence that Respondent erroneously claim hours for PCA services provided by Tunji. To the contrary, Tunji erroneously claimed hours for PCA services provided by Respondent.¹⁵

Based upon these Conclusions, and for the reasons set out in the accompanying Memorandum, the Administrative Law Judge makes the following:

¹² Minn. R. 1400.7300, subp 5.

¹³ Notice and Order for Prehearing Conference and Hearing, filed January 14, 2010.

¹⁴ Test. of J. Twaddle; Ex. 2.

¹⁵ Test. of Tunji.

RECOMMENDATION

Based on these conclusions, the ALJ recommends that the Department impose a sanction less severe than suspension, such as monetary recovery¹⁶ and the imposition of the costs of the investigation¹⁷ and/or other sanction as deemed appropriate under these circumstances.

Dated: August 9, 2010

s/Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record and this report. The Commissioner may adopt, reject, or modify this Report and Recommendations.

Under Minn. Stat. § 14.61, the Commissioner may not make a final decision until after the parties have had access to this report for at least 10 days. During that time, the Commissioner must give any party adversely affected by this report an opportunity to file objections to the report and to present argument supporting its position. Parties should contact Cal Ludeman, Commissioner of Human Services, P.O. Box 64998, St. Paul, MN 55164-0998, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration for doing so. The Commissioner must notify the parties of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

¹⁶ Minn. Stat. § 256B.064, subd. 1a.

¹⁷ Minn. Stat. § 256B.064, subd. 1d.

MEMORANDUM

There are two basic issues presented in this case: the first is whether Respondent performed PCA services for M.D. on dates when it is reported that he was in school. The hours at issue total ten over a four day period of May 2, June 2, 3, and 5, 2008. Respondent challenges the evidence relied on by the Department and argues that M.D. was not in school and that Respondent's representation that she provided M.D. PCA services on those dates should be believed.

The second issue relates to PCA services rendered on May 6, July 19, and 25, August 21, and September 8, 2008, PCA hours totaling fourteen hours. There is no question that services were provided for M.D. for the particular hours claimed, the question is by whom. Both Respondent and Tunji claimed the same hours for MA reimbursement. Respondent points out that the Department made an erroneous entry at page DHS 67. The Department acknowledged this at the hearing and that entry was stricken. Tunji's un rebutted hearing testimony that he made the remaining overlapping errors disposes of this issue.

As for the first issue, the Department relied on M.D.'s Student Attendance Record¹⁸ which documents days absent from school for the period from December 13, 2007 through June 4, 2008. The form indicates the date of an absence, the reason for the absence, whether the absence was for the full (F Day) or half day (H Day). There is no indication that M.D. was absent on May 2 or June 2, 3, or 5, 2008.

Respondent attempts to cast doubt about the accuracy of the document. She asserts that the Student Attendance Record indicates that M.D. was at home on June 4, 2008. That is not what the document shows. The document indicates that M.D. was absent half of the day, denoted by "H" in the appropriate box. The Respondent and Tunji's claimed hours for PCA services rendered on June 4, 2008 support this fact as well.¹⁹ Respondent claimed one hour from 7:00-8:00 a.m. in the morning before M.D. went to school and Tunji claimed twelve hours from 11:00 a.m. until 11:00 p.m. when M.D. returned home. The reasonable conclusion is that M.D. was in school on June 4, 2008.

Respondent also asserts that the evidence is insufficient because the School District Representative indicated to the investigator that "She was unable to provide exact attendance times."²⁰ The ALJ disagrees and finds that the Department has met its burden relying on the Student Attendance Record.²¹ The evidence shows that the same district representative relied on the Student Attendance Record in determining attendance.²² The Respondent violated Minnesota law and rule by claiming MA reimbursement for the dates of May 2, June 2, 3, and 5, 2008, totaling ten hours.

¹⁸ Ex. 2, dated November 16, 2008.

¹⁹ Ex. 1, DHS 29.

²⁰ Ex. 5, J. Twaddle's note to the file, dated March 18, 2009.

²¹ Ex. 2, dated November 16, 2008.

²² Ex. 3, J. Twaddle's hand written note to the file, dated November 18, 2008.

The Department has sought to suspend Respondent for two years based on assertions that Respondent wrongfully claimed MA reimbursement for ten PCA hours over the course of four days and 22 hours which overlapped with Tunji's hours over the course of 5 days. The overlapped hours were reduced during the hearing to 14 and Tunji has accepted responsibility for those errors. Respondent is responsible for the 10 hours wrongfully claimed.

In light of this analysis and considering Respondent's clear professional health care record, suspension appears to be disproportionate to the violations. A lesser sanction is recommended.

M. J. C.